SUBJECT INDEX.

PAGE

I. Preliminary Statement 1

II. The Government has apparently misconceived the issues presented, and, accordingly, "The Question Presented" (Govt. Brief, pp. 2 *et seq.*) has not been properly stated by it. Further, the Government erroneously assumes, without more, that "there would appear to be no substantial question as to the constitutionality of" its "suggested application of the Joint Resolution" 2

The United States Gold Dollar Is Not the Fundamental Measure of Value. The Number of Foreign Monetary Units Sought Is Fixed in the Security Itself and Does Not Change Whether or Not Either the Dollar or the Guilder or, for that Matter the Pound Sterling, Be More or Less Valuable in Relation to Each Other 4

The Securities Sued Upon Are International Contracts and Have Been Such Since Their Inception 7

There Is Grave Doubt as to the Constitutionality of the Government's Suggested Interpretation of the Joint Resolution 8

Congressional and Administrative Action Belie the Government's Assumption of Any Congressional "Intent" to Prevent the Payments Here Sought 10

This Case Is Really a Simple Problem in Contracts, Requiring the Application of Conventional Doctrines of Contract and Conflict of Laws. The Contract at Bar Is Payable and

PAGE

Performable in Holland. The Law of Holland Permits Recovery of Guilders and the Law of the United States Permits Recovery of Damages for Failure to Deliver Guilders Abroad. The Government Has Overlooked the Fact that the Foreign Decisions It Cites Apply the Joint Resolution to the "Gold Clause" in Bonds, Where the United States Was Provided as the Place of Payment, and Dollars as the Medium. Applying Conflict Principles, and Upon the Reasoning of Those Cases Themselves, as Well as Upon the Authority of Other Foreign Cases Involving the Joint Resolution, Respondents Are Entitled to Recover 18

(a) As to the Right of Election 18

(b) Effect of Petitioner's Concession 22

(c) As to the Principles of Contract and Conflict of Laws Involved 22

III. CONCLUSION. The Government brief, based as it is upon a misunderstanding of the legal, constitutional, and economic problems involved, and being in express conflict with the Congressional and administrative construction of the Joint Resolution (in so far as concerns its application to the multiple currency features of the Bonds and coupons), creates no basis for disagreeing with the New York Court of Appeals below. The judgment appealed from should be affirmed 28

TABLE OF AMERICAN CASES.

PAGE

Bayside Fish Co. v. Gentry, 297 U. S. 422, 428 (1936) .. 9
Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland, 269 N. Y. 22 (1935), cert. den. 297 U. S. 705 (1936) 5
Erie R. R. Co. v. Tompkins, 304 U. S. 64 (1938) 20
Fox v. Standard Oil Co., 294 U. S. 87, 96 (1935) 6
Gant v. Oklahoma City, 289 U. S. 98, 102 (1933) 9
Holyoke Water Power Co. v. American Writing Paper Co., 300 U. S. 324 (1937) 4, 9
Insurance Company v. Dutcher, 95 U. S. 269 (1877) .. 21, 22
Moran v. Standard Oil Co., 211 N. Y. 187 (1914) 20
Nicoll v. Sands, 131 N. Y. 19 (1892) 22
Norman v. B. & O. R. R. Co., 294 U. S. 240 (1935) 4, 9
37 Op. Atty. Gen. 250 (1933) 8, 11
Perry v. United States, 294 U. S. 330 (1935) 9
United States v. Mo. Pac. R. Co., 278 U. S. 269, 279-280 (1929) 9

TEXT BOOKS, TREATISES, ETC.

Application for Registration of 30-Year 6% Gold Debenture Bonds, etc., "The Toyo Takushoku Kabushiki Kaisha" (The Oriental Development Company, Ltd.) . 11
Ballantine's Law Dictionary (1930), p. 944 5
Nussbaum:
"Money in the Law" (1939) 23, 24
"Comparative and International Aspects of American Gold Clause Abrogation," 44 Yale L. R. 53 (1934) . 24
"Multiple Currency and Index Clauses," 84 U. of P. L. R. 569 (1936) 11, 24
Restatement, Contracts:
Sec. 325 19
Sec. 236 (d) and Comment on Clause (d) 21
Williston on Contracts:
Sec. 621 ..... 18, 21
Sec. 781 19
Plesch, "The Gold Clause," Vol. 2, 2nd Ed., Stevens & Sons, Ltd., London (1936) 25

STATUTES AND REGULATIONS.

PAGE

Executive Order No. 6560, dated Jan. 15, 1934 ..... 13, 14
Insurance Law of the State of New York, Sec. 16, subsecs. 1, 2, 3 15
31 U. S. C. A., Sec. 372 12
Treasury Department Regulations, effective Nov. 12, 1934 ..... 13, 14
Values of Foreign Moneys, Treasury Department, Office of the Secretary, Washington, D. C., April 1, 1939, Department Circular No. 1, Director of the Mint 12

FOREIGN DECISIONS AND STATUTES.

Allgemeine Elektrieitaets Gesellschaft (A. E. G.) of Berlin and Siemens & Halske Aktiengesellschaft of Berlin v. Journallag, Aktiengesellschaft (Corporation) of Glarus (Librairie de Jurisprudence Ancienne et Moderne, Paris—Plesch, "Die Goldklausel") 26
Batavsche Petroleum Company, case of (Bull. Inst. Jur. Intl., Vol. 34, pp. 315-321) 25
British & French Trust Corporation, Ltd. v. New Brunswick Railway Co., Ltd., 54 The Times L. R. 172 (1937) (Court of Appeal), (affirmed by House of Lords, December 13, 1938, 55 The Times L. R. 260) 27, 28
Conclusions of Attorney General Berger, Attached to the Supreme Court of the Netherlands, in the matters concerning the loan of the Societe des Services Contractuels des Messageries Maritimes (Niewe Rotterdamsche Courant, March 3, 1939) 26
Dutch Civil Code, Arts. 1308-1313 19
Guebhard v. Siemens & Halske A. G. and Siemens-Schuckertwerke G.M.B.H. (Court for Civil Matters for Dept. of the Seine, July 23, 1936), pp. 45-51 of "Recueil D'Arrets Et De Consultations Sur La Clause-Or," Plesch. 27

PAGE

Mouren v. Societe des Services Contractuels des Messageries Maritimes (Court for Civil Matters of The Department of the Seine [Part 1], decided Nov. 16, 1338, reported in Gazette du Palais, Nov. 26, 1938) . . 25

Rex v. International Trustee for Protection of Bondholders (1937), A. C. 500 (House of Lords) 23

Swiss Insurance Law, Art. 15, and Decree dated Sept. 11, 1931 14

Vereininging voor den Effectenhandel (plaintiff-appellant) v. Nederlansche Maatschappij tot Exploitatie van Petroleumbronnen in Nederlandsche-Indie (defendant-respondent), Supreme Court of the Netherlands High Council (March 13, 1936) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591.

BETHLEHEM STEEL COMPANY,
Petitioner,
against
ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDRO-PRESS HANDELS, A. G., a Liechtenstein corporation,
Respondents.

RESPONDENTS' REPLY TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*.

I.

Preliminary Statement.

This case (together with Nos. 384, 495 and 590) was re-argued before this Court during the week commencing April 24, 1939. During the course of the argument, and on April 26,

1939, a Brief for the United States as *Amicus Curiae* was served and filed, the United States theretofore having taken no part in the case and having given no indication that it would take any position upon the questions before the Court.

This Reply Brief for Respondents is filed pursuant to oral permission given by this Court upon the oral argument.

II.

The Government has apparently misconceived the issues presented, and, accordingly, "The Question Presented" (Govt. Brief, pp. 2 *et seq.*) has not been properly stated by it. Further, the Government erroneously assumes, without more, that "there would appear to be no substantial question as to the constitutionality of" its "suggested application of the Joint Resolution."

The Government quite evidently misconceives the issues presented. Its misconception is based upon eight distinct fallacies which underlie and pervade its entire brief.

1. It erroneously assumes one of the basic questions at issue in this case, as if it were conceded both in fact and in law—namely, it assumes that the United States gold dollar is the fundamental measure of value in the contracts in question (Govt. Brief, pp. 3, 4);

2. It erroneously assumes that Respondents are endeavoring to recover foreign moneys based upon the gold value of the American dollar, which is not the fact. The erroneous assumption is likewise made that the contract was entered into "in contemplation of American law" (Govt. Brief, p. 24);

3. It fails to recognize that the payment in foreign moneys promised in the Bonds and coupons has no relation to and is not governed by "any coin or currency of the United States," and, the election once having been exercised, the instrument became one for the payment in Holland only of guilders only; that the number of foreign monetary units

is fixed in the Bonds and coupons and does not depend upon the dollar; and that, irrespective of currency fluctuations, a creditor exercising his election to take guilders in Holland, could receive no more and no fewer guilders than the amount specifically set out in the Bonds and coupons, whether those guilders happen at that time or at any other time to be worth more or less than the separate, distinct and unrelated amount of dollars or sterling set forth in the same instrument;

4. It fails to recognize that the securities here in question were from their inception, and now are, international in character, having been floated in Holland upon a Dutch prospectus in the Dutch language by a debtor doing an international business, and in America and England upon an English language prospectus (R. 77-80) and subscriptions having been taken in Holland by Dutch banking houses, in England by a British banking house and in New York by an American banking house (R. 81-83);

5. It erroneously assumes (Govt. Brief, footnote 1, p. 2), as if it were a conceded conclusion—which it is not—that "there would appear to be no substantial question as to the constitutionality" of its "suggested application of the Joint Resolution";

6. It erroneously assumes (Govt. Brief, p. 4)—without proof—a Congressional intention to make a distinction between instruments payable in foreign moneys *simpliciter* and those payable in multiple currencies, without one shred of reference to any data which might indicate such a Congressional intention;

7. It ignores relevant administrative and Congressional action, and Petitioner's own concessions;

8. It utterly ignores the fact that performance was required in Holland, that under Dutch law the payment demanded is legal, that the case is a simple one in contracts, and that under well settled Contract and Conflict of Laws doctrines this Court should permit recovery.

The United States Gold Dollar Is Not the Fundamental Measure of Value. The Number of Foreign Monetary Units Sought Is Fixed in the Security Itself and Does Not Change Whether or Not Either the Dollar or the Guilder or, for that Matter, the Pound Sterling, Be More or Less Valuable in Relation to Each Other.

The Government at page 6 *assumes*, without more, and in the face of the circumstance that the contrary is the fact, that this is a "dollar debt," that "The primary purpose of the payment provision * * * was to assure the bondholder that he would receive payment in gold dollars of the standard of value in existence at the time the bonds were issued, or in an equivalent value." and that "the gold dollar clause remained the fundamental and dominant measure of value." There is nothing in the record to justify any such statement. In fact, the record justifies the conclusion that the foreign money alternative was inserted specifically for the purpose of assuring payments abroad in foreign moneys (see, for instance, American and Dutch offering circulars, R. 77-82; also Petitioner's letter to the Stock Exchange, R. 57-59; our Supp. Brief, Appendix A), and in the particular case at bar, it further appears that all the purchases were "made to protect obligations in currencies other than dollars" (R. 69).

The decisions in the *Norman* and *Holyoke* cases, when used in the manner cited by the Government (Govt. Brief, p. 3), take the cases out of their setting, and are entirely inapropos.

The distinctions seem self-evident:

(a) In the *Norman* case the bonds were *domestic obligations* ONLY, and *payable in gold dollars* ONLY, no question of payments abroad or of foreign currencies, or of right of election to take foreign currencies, being involved (see, among other things, our Main Brief, pp. 17, 29, 42, 52, 65); and

(b) In the *Holyoke* case the alternative payments were keyed to, dependent upon, and measured in value by, gold or a particular kind of coin or currency of the United States (see our Main Brief, p. 57 *et seq.*).

The *Inversiones* case is dragged in by the ears at page 12, although the bonds there contained only, as the Government concedes, "a straight gold coin clause" payable solely in this country, and the citation is therefore not relevant (see also, our Main Brief, pp. 17, 76).

The Government (Govt. Brief, p. 10) has adopted an argument heretofore made on behalf of one of the respondents to the effect that the "obligation" [1] is "capable of being paid in dollars" merely because the instrument contains the separate "gold clause" promise.

Without enlarging upon the arguments heretofore advanced by us upon this point (see our Main Brief, Point B, pp. 21 *et seq.*), we submit that the words are not susceptible of the construction for which the Government contends, as is exemplified by the following definition of the word "payable," found in *Ballantine's Law Dictionary* (1930), at p. 944:

> "*payable* (*pā'a-bl*) When the word is used in commercial transactions, and in instruments such as a promissory note, it signifies 'to be paid,' rather than 'which may be paid' (Century Dictionary); and it does not imply any alternative condition, privilege, or option, but it does imply the positive and absolute condition of payment **at the time, place, and in the specific funds, named.** See Johnson v. Dooley, 65 Ark. 71, 40 L. R. A. 74, 44 S. W. Rep. 1032." (Emphasis ours.) [2]

See, also, decision of New York Court of Appeals, below, R. 109.

It becomes relevant to advert to the argument originally made by Petitioner in connection with the use of the word "obligation," now impliedly adopted by the Government. Petitioner was evidently driven from its original statement that the word "obligation" meant the whole instrument, and that the whole instrument could be discharged by payment "dollar for dollar," to the position that only the "money payment" features of the instrument were intended to be

[1] To pay guilders abroad.

[2] Unless otherwise noted, all emphasis in this brief is ours.

affected by the Joint Resolution, including, however (accor
ing to Petitioner), the foreign money alternatives. But th
later construction of the word "obligation" would have th
same result as if it were construed to mean the whole instr
ment itself; if the concession is once made, as it has bee
made by Petitioner, that the word "obligation" refers onl
to the "money payment" provision, then it seems clear, a
a necessary corollary thereof, that it can refer only to th
United States money payment obligation, because "coin o
currency of the United States" are the only kinds of "coi
or currency" with which the Joint Resolution purports t
deal. Furthermore, the Government's construction woul
seek to accomplish a discharge by having Petitioner pa
"dollar for guilder" (not "dollar for dollar," as the Joi
Resolution provides), and would also destroy the covena
of negotiability contained in the Bond (R. 29).

Petitioner seeks (this is also the effect of the Governmen
suggestion) to accomplish by substitution of dictionar
definitions, a reading of the Joint Resolution different fro
its plain words. Substitutions of dictionary definitions ar
ineffective aids to statutory construction (see quotatio
from *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96 (1935), i
footnote 44, p. 99 of our Main Brief), and lead to absur
and inconceivable results. Example: "A giraffe is a fou
footed animal." A horse is also a four-footed animal. B
substitutions of definitions, we reach the absurd result: "A
giraffe is a horse." Exactly the same result is sought to b
achieved by Petitioner when it substitutes what it states t
be a selected dictionary definition of the word "obligation,
i. e., the word "contract," and so seeks to justify its con
struction of the Joint Resolution.

The word "obligation" as used in the Joint Resolutio
refers only to that particular "obligation" (i. e., debt o
duty) which is provided to be payable in the proscribe
mediums.[3] As applied to the securities here in suit, it refer

[3] Viz., (a) "gold," or (b) "a particular kind of coin or currency of th
United States," or (c) "an amount in money of the United States measure
thereby," i. e., measured by "gold" or by "a particular kind of coin or currenc
of the United States."

only to the "gold clause" term of the securities, and not to the separate and independent foreign money alternatives.

This case is a simple one in contracts, involving merely the application of accepted doctrines of Contracts and Conflict of Laws.

The Securities Sued Upon Are International Contracts and Have Been Such Since Their Inception.

The Government evidently fails to appreciate that the securities before this Court were sold by Petitioner to its creditors under and pursuant to the terms of a separate, distinct and independent Dutch offering prospectus (see R. 81-83; see also our Supp. Brief, Appendix A), and were purchased by such Dutch purchasers, presumably in reliance upon the equally independent and separate foreign money alternatives therein contained (including the guilder and the pound sterling), which have at all times been relied upon by these purchasers and their successors in title, under accepted principles of negotiability, as containing separate, distinct and alternative options exercisable at their own election; moreover, the construction of the instrument by the debtor itself from time immemorial so far as the contract is concerned, even beyond the date of the Joint Resolution (see our Supp. Brief, Point A, pp. 3 *et seq.*) has been exactly in line with the interpretation which Respondents in this case have hitherto advanced, and which was sustained as a matter of contract interpretation by the New York Court of Appeals, in the State Court below (R. 109).

There can be no question, under every circumstance contained in the Record, that the securities before the Court were in their inception international in character, and have remained such ever since; and that after election by the foreign holder under and pursuant to the terms of the instruments themselves (as both the creditor and the debtor understood and construed those terms), it became an international debt payable thereafter in terms of guilders only. The Government's attempt to place this transaction entirely in America must, under every circumstance of the Record and the admitted facts therein contained, meet with failure, and

its further attempt to distinguish between international debts in general and this particular debt (which is also clearly international in character) is created merely to conform with the basic fallacies which run throughout the Government brief.

There Is Grave Doubt as to the Constitutionality of the Government's Suggested Interpretation of the Joint Resolution.

Constitutionally, Congress is without power to regulate or govern payments to be made abroad (even were such payments to be made in gold coin,[4] which the payment here sought is not); certainly Congress is without power and did not attempt to regulate the payment of guilders to be made in a foreign country.

This the Government fails to recognize in its bland assumption that its suggested interpretation would raise "no substantial question as to the constitutionality * * * of the Joint Resolution" (Govt. Brief, footnote 1, p. 2). On the original argument before this Court and on the reargument questions from the Bench indicated that the contention of Petitioner (in which the Government now belatedly joins) would raise the gravest doubts as to the constitutionality of the Joint Resolution as applied to the contract upon which Respondents sue. That such an extra-territorial interpretation might well make the Joint Resolution unconstitutional in this respect has already been discussed. See our Main Brief, pp. 35, 54, 74.

Furthermore, the construction of the Joint Resolution contended for by the Government would not only destroy these constitutional rights (in the sense discussed at page 35 *et seq.*, 54 *et seq.* and 74 of our Main Brief), but would additionally result in the destruction of the promises found in the Bonds (R. 29) that "This bond shall pass by delivery," and that the coupons shall be negotiable and "shall continue to be transferable by delivery merely."

If extrinsic evidence of foreign ownership prior to June 5, 1933, is required as a condition of payment, then the

[4] 37 Op. Atty. Gen., 230 (1933), cited and discussed in our Supp. Brief, p. 7 *et seq.*

negotiability of the promise is impaired, and the additional valuable property right of negotiability is thereby destroyed.

The very fact (as conceded by the Government, Govt. Brief, footnote 3, p. 7) that the debtor may well have received a "few points more" for its Bonds by the insertion of the multiple currency clause lends weight to our contentions.

Even on the Government's own present theory (which we do not concede) that debtors were relieved by the Joint Resolution from paying abroad in currencies not mentioned therein, the Joint Resolution could not work exact equality in each and every case; the debtors having been discharged from by far the greater proportion of all their indebtedness by the striking of the "gold clause," the legislation could not seek to correct every small detail of every debt owing by them, and if, incidentally (as is the case here), 5% of a particular company's debt must be discharged in the medium originally contracted, the substantial purposes of the Joint Resolution—(which nowhere condemns such payment)—even as now suggested by the Government,—have been more than fully accomplished. *Gant* v. *Oklahoma City*, 289 U. S. 98, 102 (1933); *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422, 428 (1936); cf. *United States* v. *Mo. Pac. R. Co.*, 278 U. S., 269, 279-280 (1929).

At page 11 the Government refers to a "windfall" and to "unjustified enrichment," again citing the *Norman*, *Holyoke* and *Perry* cases. Such language might be applicable to those cases, which covered domestic securities only which were payable in dollars only; but in the instant case the "windfall" and the "unjustified enrichment," if any, will be for the benefit of the debtor and not of the creditor, if the Government's suggestion is adopted (see our Supp. Brief, Point D, pp. 18-24, showing that Petitioner has never paid either dollars or guilders of equal power to those which it borrowed, and that only about 5% of Petitioner's total funded debt contains multiple currency clauses).[5]

[5] Appendix C to the Government Brief is utterly misleading. In the first place, it compares the cost with 105% of par; in the second place, and more importantly, it fails to emphasize that the value of the guilder has substantially depreciated since the Bonds were purchased. By the same line of reasoning, if a comparison were made with pre-war marks, such tabulations could show an enormous alleged profit. The effect of such arguments would be to enable a debtor to default in the performance of its just obligations, and then to let it profit by its own default.

Congressional and Administrative Action Belie the Government's Assumption of Any Congressional "Intent" to Prevent the Payments Here Sought.

At pages 13 and 14 of its Brief, the Government blandly concludes that "Congress appropriately included these obligations within the scope of the Joint Resolution," but cites no reasoning, authority or proof for any such conclusion. It admits that ordinarily the fundamental purpose of international securities of this character is to meet the desire on the part of the foreigner to receive payment in the currency of his own country where he lives and transacts business, and in which currency his debts are payable, concluding that "Congress recognizing the merit of the position of a creditor in these and comparable situations very properly left the consequences of the revaluation of the dollar to be borne in such instances by the debtor." The facts support our views.

The Bonds in the instant case were offered and sold in three countries, America, England and Holland (R. 78). If ever there was an international contract, these Bonds represent such a contract. If, as stated by the Government, Congress desired to exclude "international obligations" from the operation of the Joint Resolution, then the multiple currency features of these Bonds must be excluded therefrom; and, if, as indicated by the Government, Congress also desired to exclude payments in foreign moneys *simpliciter*, from the operation of the Joint Resolution, the same reasoning compels the conclusion that the multiple currency features of these securities must likewise be excluded therefrom.

The Government overlooks the fact that once the holder of the security here in question exercised his right to take guilders in Holland, the contract became an international contract to pay guilders merely,—exactly of the type which the Government concedes in its brief (p. 3) is not within the scope of the Joint Resolution.

Congress could not discriminate between a simple instrument payable in foreign moneys, and an instrument which

became so payable as the result of a choice legally conferred, a part of the original consideration to the purchasers of the securities.

At page 9 the Government states that "the Resolution reveals an intention 'to stop the whole business' * * *."

In the first place, the Joint Resolution reveals no such intention; but, more importantly, in the second place, what is "the whole business" which the Joint Resolution intended to stop? The whole "business" is the "gold clause" only, and there is no evidence whatsoever of any intention to "stop" any other "business," *i. e.*, to stop payments of guilders abroad on these or any other securities.

No shred of evidence appears, either in the Congressional data or in the Joint Resolution itself, or in the acts *in pari materia*, or in any of the administrative regulations, which indicates any intention to exercise any such unconstitutional power as the Government now suggests,—in fact, quite the contrary is the case (see, as supporting our position and disproving the Government's assumption, the quotation from *Nussbaum*, 84 U. of P. L. R. 573, set out in Point B(6) of our Main Brief, p. 44; also see 37 *Op. Atty. Gen.*, 250, 252-253, set out at p. 8 of our Supp. Brief).

The Government's position, now advanced for the first time, is utterly inconsistent with its previous position, both on the part of Congress itself (see our Supp. Brief, Point C, pp. 9 *et seq.*) and as set out by the opinion of the Attorney General, and also as disclosed by the other governmental departments.

For instance, the Securities and Exchange Commission accepts, for registration, issues of securities containing provisions for payment in two or more countries, in the currencies of those countries, and expressly provides in its questionnaire for information on that subject. See, for instance, *Application for Registration*, Form 21. of *"The Toyo Takushoku Kabushiki Kaisha"* (*The Oriental Development Company, Ltd.*) for its 30-year 6% gold debenture bonds, and its 30-year 5½% gold debenture bonds, which application

(pp. 7 and 8) is dated February 13, 1936, where the following questions and answers appear:

> "(m) State the currency or currencies in which payable; and if payable in two or more currencies, state the basis of determination for the currency conversion and at whose option.
>
> The 6% Gold Debenture Bond.
>
> The service is to be payable in New York in U. S. dollars, or at the option of the holder, in London in sterling money of Great Britain or in Tokyo in yen, in each case at the current buying rate of sight exchange on New York.
>
> The 5½% Gold Debenture Bond.
>
> The service is to be payable in New York in U. S. dollars."

These issues are now listed upon the New York Stock Exchange. If foreign money alternatives were proscribed, such listing and registration would obviously have been denied.

A further illustration of our point is also found by reference to *Section 372 of 31 U. S. C. A.* (*Money and Finance*), providing for the proclamation of the values of foreign moneys, pursuant to which the Treasury Department publishes periodically the values of foreign monetary units for the purpose of collecting customs dues. These publications have been continuously issued both before and after the enactment of the Joint Resolution, the latest thereof being dated April 1, 1939, from which it appears that the "value in terms of U. S. money" of the guilder is fixed at **$.6806**, and where, under the heading of "Remarks," the Government makes the following statement in respect of the guilder:

> "Suspension of convertibility of notes into gold and restrictions placed on free gold exports—Sept. 26, 1936; gold export prohibition repealed by decree June 28, 1938."[6]

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[6] *Values of Foreign Moneys, Treasury Department, Office of the Secretary, Washington, D. C., April 1, 1939—Department Circular No. 1, Director of the Mint.*

If the Government sees no objection to collecting its duties upon the basis of an appreciated guilder, it follows that it must see no objection to payment by a private obligor in the guilders which it had contracted to pay, even though their value had appreciated.

As further evidencing the administrative construction to the effect that the payment of guilders abroad upon these securities has never been considered as being in violation either of the Joint Resolution or of any act *in pari materia*, we refer to *Treasury Department Regulations*, effective November 12, 1934, signed by the Secretary of the Treasury and approved by the President, which supplement and further implement *Executive Order No. 6560*, dated January 15, 1934, cited at page 46 of our main brief. Article 2 of the Regulations provides as follows:

> "Article 2. (General License Granted.)—Licenses may be granted, and a general license is hereby granted, to all individuals, partnerships, associations, and corporations, authorizing any and all transactions in foreign exchange, transfers of credit, and exports of currency (other than gold certificates) and silver coin. The general license herein granted authorizes transactions to be carried out which are permitted by the Executive Order of January 15, 1934, under license therefor issued pursuant to such Executive Order; but does not authorize any transaction to be carried out which, at the time, is prohibited by any other order or by any law, ruling or regulation."[7]

Article 3 of the same *Regulations* provides that "in order that Federal Reserve Banks may keep themselves currently informed as to foreign exchange transactions and transfers of credit," as provided in *Executive Order No. 6560* above cited by us, "every person engaging in any transaction, transfer, export or withdrawal shall furnish to the Federal Reserve Bank of the District in which such person has his principal place of business in the United States, complete information relative thereto, upon report forms prescribed by the Secretary of the Treasury, except that reports are not required to

[7] We know of no prohibitory order, ruling or regulation applicable here.

be furnished * * *" by certain persons under certain specified circumstances not relevant here.

Inasmuch as Petitioner, according to its own admissions (see our Main Brief, p. 28), has been "voluntarily" paying guilders abroad to certain holders of these Bonds, we may fairly assume that the required reports of these transactions have been made, and that the necessary information has been in the possession of the administrative branches of the Government since June 5, 1933; and if such payments came, as we believe they did, within the express permission of *Executive Order No. 6560* of January 15, 1934, then the construction for which we contend is, of course, supported; if, on the other hand, such payments did not come within such express permission, and permission was required, then the granting of such permission by the governmental authorities likewise supports the position for which we contend; and, in any event, the knowledge of such payments—being brought home to the Government through the Federal Reserve Bank by means of the reports provided for in *Treasury Department Regulations of November 12, 1934*—must be deemed to constitute an acquiescence by the Government in our construction that such payments are in no way prohibited or affected by the Joint Resolution.

The morass into which the reasoning of the Government would lead is exemplified by the following hypothetical situation:

Take, for instance, the Respondent in No. 590, which is an international insurance company, as Petitioner is an international industrial enterprise. It is of course a well-known fact that insurance companies invest some of their assets in the various countries in which they insure and reinsure risks, so as to make available in those countries the currencies of those countries with which to pay possible losses. See, for example, *Article 15 of the Swiss Insurance Law*, and *Decree dated September 11, 1931, Concerning Control of Private Insurance Companies*, the prescriptions of which, in part, have the necessary effect that if, for instance, a Dutch company has insured a Dutch life in guilders which is reinsured by a Swiss company, the Swiss reinsurance company must invest in securities which are payable in Dutch cur-

rency; see also, for instance, in regard to investments of domestic insurance companies, *Section 16 of the Insurance Law of the State of New York*, sub-sections 1, 2 and 3 of which are set forth in the footnote.[8] Suppose, for instance, that the Zurich Company (the Respondent in No. 590) insured a risk for the Bethlehem Steel Company (the Petitioner therein) in Holland in terms of Dutch guilders. Suppose that, in order to protect its risk, it invested in the multiple currency bonds of the Bethlehem Steel Company, which are payable alternatively in guilders in Holland at the option of the holder. A loss then actually occurs in Holland which the Zurich Company is required to meet in guilders, and for that purpose it thereupon seeks to collect upon the Dutch guilder feature of the Bethlehem Steel Company bonds.

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[8] "1. The cash capital of every domestic insurance corporation required to have a capital, to the extent of the minimum capital required by law, shall be invested and kept invested in the stocks or bonds of the United States or of this state, not estimated above their current market value, or in the bonds of a county or incorporated city in this state authorized to be issued by the legislature, not estimated above their par value or their current market value, or in bonds and mortgages on improved unencumbered real property in this state worth fifty per centum more than the amount loaned thereon.

"2. The cash capital of every foreign insurance corporation to the extent of the minimum capital required of a like domestic corporation shall be invested and kept invested in the same class of securities specified for domestic insurance corporations, except that like securities of the home state of an insurance corporation organized under the laws of another state of the United States, shall be recognized as legal investments for the amount of the minimum capital required.

"3. The residue of the capital and the surplus money and funds of every domestic insurance corporation over and above its capital and the deposit that it may be required to make with the superintendent, may be invested in or loaned on the pledge of any of the securities in which deposits are required to be invested or in the public stocks or bonds of any one of the United States, or in bonds and mortgages on improved unencumbered real property in this state worth fifty per centum more than the amount loaned thereon, or in notes or bonds secured by mortgage or trust deed (including any part of an issue of such notes or bonds) insured by the federal housing administrator under provisions of an act of the congress of the United States, entitled "national housing act" in effect June twenty-seventh, nineteen hundred thirty-four, or in debentures issued by the federal housing administrator pursuant to said national housing act, and any amendments thereto which hereafter may be made, or except as in this chapter otherwise provided, in the stocks, shares, bonds or other evidences of indebtedness of any solvent institution, created or existing under the laws of the United States or of any state thereof, or in adequately secured equipment trust certificates or other adequately secured instruments evidencing an interest in transportation equipment and a right to receive determined portions of rental, purchase or other fixed obligatory payments for the use or purchase of such transportation equipment, or in adequately secured certificates of trustees or receivers of any such institutions which, or the assets of which, are being administered under the direction of any court having jurisdiction, or in such real estate as it is authorized by this chapter to hold."

According to the Government, Bethlehem Steel Company could discharge its obligation by paying *in the United States* a fixed number of *dollars*, instead of paying *in Holland the fixed number of guilders set forth in the Bonds*. The Zurich Company, on the other hand, would be compelled to meet its obligation in guilders in Holland in full, while the Bethlehem Steel Company would, in the self-same transaction, be relieved from performing its own obligations. Congress could never have intended any such result; it would be unconscionable, illegal and unconstitutional; but such a result is inevitable if the Government's suggestion is sustained.

The Government Brief, in Appendix D, purports to set out a summary of bonds of American corporations, interest on which is payable at the option of the holder either in American dollars or in one or more foreign currencies, at a fixed rate of exchange—"by type of currency option." The table is somewhat misleading. Bonds payable in American and Canadian dollars, or in American dollars, Canadian dollars and sterling, or in American dollars and sterling, surely cannot affect the domestic economy, since both sterling and Canadian dollars are selling either "at a parity," or "at a discount."

"All other options" are thereupon lumped together, and it is indicated that $307,000,000—of "all other options" are outstanding, of which $22,000,000 are stated to represent foreign holdings; and that of these totals, a certain number are in default, or have now been called, and that there are now outstanding and not in default, "all other options" amounting to $102,000,000—of which $13,000,000 are stated to represent foreign holdings.

Even if the "all other options" represented the true amount of multiple currency bonds, alternatively payable in currencies selling at a "premium"—which it quite apparently does not—the total amount thereof, as disclosed by the "Appendix," is insignificant, representing, as it would, *approximately one-tenth of 1%* of the total amount of "gold clause" securities outstanding, with a consequent insignificant impact upon the domestic economy.

But there are only an insignificant number and amount of multiple currency bonds outstanding, with optional payments in "premium currencies" (see footnote 22, p. 53 of our Main Brief). The total outstanding in the hands of the public and not in default is approximately $35,000,000 only—representing less than 5% of the funded debts of the corporations involved and an insignificant fraction of 1% of bonds containing the conventional "gold clause."

These comments on the statistics used by the Government apply irrespective of, and in addition to, the fact that the multiple currency features of the Bonds were never intended to be affected by the Joint Resolution, and are not of the character which the Joint Resolution sought to reach.

A compilation of foreign bonds registered with the Securities and Exchange Commission, and dealt in in the United States, shows that the total thereof is at least the sum of $2,355,000,514.[9] To some extent, this last-mentioned figure overlaps the figure of $3,280,988,000 referred to at page 26 of our Supplemental Brief, and to some extent it is in addition thereto, the $3,280,988,000 figure representing issues listed on the New York Stock Exchange, and the $2,355,514,000 figure representing registered issues, whether or not so listed. Included within the $2,355,514,000 are a number of issues payable either in dollars or at the option of the holder in various foreign currencies, as, for instance, City of Antwerp bonds payable in dollars in New York or pounds in London; Berlin Electric Underground bonds payable in dollars in New York or guilders in Amsterdam; Kingdom of Bulgaria bonds payable in dollars in New York or Belgian francs in Brussels, or lire in Milan, or Swiss francs in Zurich; Canadian Pacific bonds payable in dollars in New York or Canadian dollars in Montreal; Republic of Colombia bonds payable in dollars in New York or pounds in London; General Electric Company of Germany bonds payable in dollars in New York or pounds in London; Rhine Westphalia Electric Power Corporation bonds payable in dollars in New

[9] This figure is based upon a compilation made from registration statements and other information on file with the Securities and Exchange Commission in New York City.

York or guilders in Amsterdam, or pounds in London or kroner in Stockholm.

It would be just as logical for these foreign issuers to declare that dollars may no longer be paid in America upon their dollar bonds—but that, for instance, instead, German marks must be received in Germany at some predevaluation rate of exchange, despite the express agreement on the part of the issuer to pay foreign moneys in another country—as it would be, in the case at bar, to hold that Petitioner may pay dollars in America after the bondholder had elected, pursuant to the terms of the Bond, to take guilders in Amsterdam.

This Case Is Really a Simple Problem in Contracts, Requiring the Application of Conventional Doctrines of Contract and Conflict of Laws. The Contract at Bar Is Payable and Performable in Holland. The Law of Holland Permits Recovery of Guilders and the Law of the United States Permits Recovery of Damages for Failure to Deliver Guilders Abroad. The Government Has Overlooked the Fact that the Foreign Decisions It Cites Apply the Joint Resolution to the "Gold Clause" in Bonds Where the United States Was Provided as the Place of Payment, and Dollars as the Medium. Applying Conflict Principles, and Upon the Reasoning of Those Cases Themselves, as Well as Upon the Authority of Other Foreign Cases involving the Joint Resolution, Respondents Are Entitled to Recover.

(a) As to the Right of Election:

Upon the oral argument, a question was asked from the Bench in respect of the foreign currency alternative in the Bonds.

Even were the promise ambiguous (which we deny), doubts ensuing therefrom are resolved in favor of the promisee, Respondents at bar. *Williston on Contracts*, Sec. 621.

Where the option is given to the creditor, the party to whom the option is given has the right of election.

See *Williston on Contracts*, Section 781, as follows:

"§781. Alternative contracts.

A contract may give an option to one or both parties either to perform a specified act or to make a payment; and though this form of contract cannot be used as a cover for the enforcement of a penalty, yet if on a true construction it appears that it was intended to give a real option, (that is that it was conceived possible that at the time fixed for performance, either alternative might prove the more desirable) the contract will be enforced according to its terms. (citing cases) * * *"

In respect of alternative contracts, as at bar, the law is stated in *Restatement, Contracts,* as follows.

§325. Breach of an Alternative Contract.

* * * * * * *

(2) When an alternative contract has ceased to be alternative by reason of an election by the party having the option, by impossibility of performing one or more of the alternatives, or otherwise, a breach as to the one remaining alternative may occur in the same way as if the contract had originally provided for only that performance."

The Dutch Law, *Articles 1308-1313 of the Dutch Civil Code* (see R. 51) is to the same effect.

The option at bar is specifically provided for in the Bond itself (R. 27-28). No question has ever been raised in this case contesting the right of the creditor to make the election. Counsel for Petitioner, upon oral argument in this Court, specifically conceded that this was the fact, and that Petitioner had always construed the option as being in the creditor. To the extent that it is possible for anything to be the "law of the case" in this Court, we respectfully submit that the fact that the option resides in the creditor at bar is settled here. Furthermore, the question, if any existed, as to where the option of election resided, is a State Court question. Inasmuch as, concededly, the right resided in the

obligee at bar, this Court should not in any event examine the question anew of its own motion. *Erie R.R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

But even if the option were ambiguous, which we respectfully submit it is not, Petitioner itself, in the letter of January 11, 1934, to the New York Stock Exchange, construed the language as providing for payment **in foreign countries in the currencies of such countries, at the options of the holders, in the amounts specified in the coupons for such countries**, using the following words (R. 58):

> "The apparent purpose of providing for payment of the interest on and the principal of such bonds in foreign countries was to facilitate their sale and distribution in such countries by enabling residents of such countries who might purchase any of such bonds to collect such interest and principal at the respective maturity dates **in such countries and in the currencies of such countries in specified amounts.** In accordance with such purpose, we made or will make provision whereby owners of such bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto for the purpose, have received or may receive payment thereof **in such countries and in the currencies of such countries in the amount specified in such coupons for such countries.**"

In *Moran* v. *Standard Oil Co.*, 211 N. Y. 187 (1914), Mr. Justice Cardozo, in construing an agreement, stated (at p. 196):

> "Since the language is the defendant's we must construe it, if its meaning is doubtful, most favorably to the plaintiff. (*Gillet* v. *Bank of America*, 160 N. Y. 549, 555; *Marshall* v. *Com'l Tr. Mut. Acc. Assn.*, 170 N. Y. 434.) We must also give its words the meaning which the defendant ought reasonably to have understood that the plaintiff would put upon them."

See, further, *Restatement, Contracts*, Section 236 (d), and Comment on Clause (d);[10] *Williston on Contracts*, Section 621.[11]

In *Insurance Company* v. *Dutcher*, 95 U. S. 269 (1877), this Court used the following language at page 273:

> "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as any thing else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

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[10] *Restatement, Contracts:*

"§236. Secondary Rules Aiding Application of Standards of Interpretation. * * *

(d) Where words or other manifestations of intention bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law. * * *."

Comment on Clause (d):

"d. Since one who speaks or writes, can, by exactness of expression, more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved against the former in favor of the latter. The other party will ordinarily be the promisee of the promise in question, so that it is generally true that the contract, if ambiguous, will be construed in favor of the promisee; but as the promisor is not invariably the draftsman of his own promise, the rule is more exactly that stated in Clause (d). This rule finds frequent application in regard to policies of insurance, which are ordinarily prepared solely by the insurance company, and, therefore, the words of the policies are construed most strongly against it. In some instances, however, the exact language not only of insurance policies, but of bills of lading and other contracts, is determined by statute. In such cases there is no reason for such an interpretation."

[11] *Williston on Contracts:*

"§621. Secondary rules. Language will be construed most strongly against the party using it.

Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter (citing cases); and as he will ordinarily be the promisee of the promise in question, it is sometimes stated that the contract, if ambiguous, will be construed in favor of the promisee (citing authority). * * *"

The New York law is to the same effect. See *Nicoll* v. *Sands*, 131 N. Y. 19 (1892), where the New York Court of Appeals used the following language at page 24:

> "The practical construction put upon a contract by the parties to it, is sometimes almost conclusive as to its meaning. (*Woolsey* v. *Funke*, 121 N. Y. 87, at 92; *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273.)"

(b) EFFECT OF PETITIONER'S CONCESSION:

On the legal principles involved, Petitioner has conceded itself out of court, and the Government's arguments must therefore likewise fail. Petitioner, by "voluntarily" paying guilders abroad to selected Bondholders, concedes that in principle the Joint Resolution does not apply to payments abroad in guilders on the Bonds here in question. Every Bond reads exactly like every other Bond. The practical construction thus placed upon the contract by Petitioner itself (i. e., to the necessary effect that the payments abroad are not payments either (a) in "gold," or (b) in "a particular kind of coin or currency of the United States," or (c) in "an amount in money of the United States measured thereby" and that payments in guilders in Amsterdam are not prohibited) must bind the Government as *Amicus Curiae*, and entitles Respondents to the recovery here sought. See *Insurance Company* v. *Dutcher, supra; Nicoll* v. *Sands, supra.*

(c) AS TO THE PRINCIPLES OF CONTRACT AND CONFLICT OF LAWS INVOLVED:

So far as the contract may have been or is now performable in the United States and payable in American currency within the United States, New York domestic law applies; but so far as the contract is performable in Holland as the result of Respondents' election (i. e., the guilder limb), the instruments are payable in guilders in that country, and under well settled Conflict principles, the law of Holland, the place of performance, applies.

In its brief (footnote 6, page 12), the statement is made by the Government that:

> "* * * SO FAR AS WE HAVE BEEN ABLE TO ASCERTAIN, nearly every foreign court that has had occasion to pass upon the question has applied the Joint Resolution to gold dollar obligations issued by foreign governments and nationals thereof whether owned by Americans or others,"

citing certain cases to be found in *Nussbaum, "Money in the Law"* (1939), pp. 387 *et seq.*, and citing also *Nussbaum's* book.

The citations are misleading. Either the book has not been read, or the cases have been misunderstood, or the Government has not grasped the reasoning of the cases cited by it. The cases cited by the Government, as will appear in the very section of *Nussbaum's* book cited by it, apply the Joint Resolution to the "GOLD CLAUSE" of bonds, PAYABLE IN THE UNITED STATES, IN DOLLARS OF THE UNITED STATES, and the foreign Courts applied the law of the place of performance (the United States).

At page 388, for instance, analyzing *Rex* v. *International Trustee for the Protection of Bondholders*,[12] *Nussbaum* states that the House of Lords

> "* * * held that the English Government had submitted to American Law and was therefore entitled to rely on the Joint Resolution. * * *"

At page 389, referring to the Swedish decision, Nussbaum states that the *Swedish Court* relied on the fact that the important contacts of the bonds were nearly all American; at page 390, that the *Norwegian Court* followed the same line of reasoning; further, at page 390, that the Austrian Court "based its opinion cumulatively on three grounds: that the currency chosen was American ('law of currency theory'); that the bonds, in fact, were issued in the United States ('place-of-contract' theory); and that the United States was the place of payment ('place of payment' theory)."

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[12] Cited as [1937] A. C. 500 [H. of L.]; see our Main Brief, pages 79, 80, for official citation.

It thus appears that properly construed the decisions cited by the Government involved nothing more nor less than the application of accepted Conflict of Laws principles, and, applying the same principles to the case at bar, the place of payment chosen being Amsterdam, Holland, and the medium of currency chosen being the Dutch guilder, the reasoning of the cases cited by the Government would compel the recovery for which Respondents sue.

As stated by *Nussbaum* himself at page 389, in discussing the cases cited by the Government:

> **"In all these cases the United States (New York) was the exclusive place of payment, a place of issuance not being indicated on the bonds."**

Nussbaum himself, in his various articles[13] and in the very book *"Money In The Law"* referred to by the Government (see Section 35 thereof, "Multiple Currency Clauses," at pages 447 *et seq.* thereof) adopts the construction of the Joint Resolution for which we contend, citing among others, many foreign cases.

Other foreign decisions not cited by the Government are also of interest.

Thus, in a case decided by the Supreme Court of the Netherlands High Council, March 13, 1936, entitled *Vereininging voor den Effectenhandel* (*plaintiff, appellant*) v. *Nederlandsche Maatschaapij tot Exploitatie van Petroleumbronnen in Nederlandsch-Indie* (*defendant, respondent*), the DUTCH COURTS, in considering an action against a Dutch corporation, held that the Joint Resolution was not applicable, and, overruling the Court of Appeal below, found "the obligation[14] to pay in Amsterdam is not impaired in law by the Joint Resolution * * *," finding, among other things, as follows:

> "That the loan of the Koninklijke, even although being an American agreement, governed by American law, has, precisely because of its having been made

[13] See, for instance, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 Yale Law Review, 53 (1934); *Multiple Currency and Index Clauses*, 84 U. of P. L. R. 569 (1936).

[14] Of the DUTCH CORPORATION in question.

payable also outside the United States of America, an international character, whilst by establishing a right to payment in this country, in order to make the subscription to the loan for the Dutch public more attractive, the loan has entered into the sphere of Dutch interest;"

The result of this DUTCH decision was to apply the law of the place of performance, and to compel a DUTCH corporate defendant to pay in Amsterdam the value of gold dollars, and is all the more remarkable in that the payment in Holland, provided for in the bonds, was "at the buying rate * * * for sight exchange on New York City" (which seemingly might have resulted in making the dollar the primary medium of payment), whereas at bar the number of foreign monetary units is fixed and determined and is not dependent in any way upon the dollar. The case at bar is therefore much stronger for Respondents than the one which the Dutch Court had before it.[15]

It is of interest to note that at the same time the Dutch Court had before it a dollar loan of the *Batavsche Petroleum Company;* but in the latter case it found that the United States was the place of payment, and in that case, on Conflict of Law principles, denied more than the dollar recovery. (No official citation available, found in *Bull. Inst. Jur. Intl.*, vol. 34, pp. 315-321.)

Recently, also, the FRENCH COURTS had occasion to consider the impact of the Canadian Joint Resolution upon the bonds of a FRENCH CORPORATION. *Mouren* v. *Societe des Services Contractuels des Messageries Maritimes*, in the Court for Civil Matters of The Department of the Seine (Part 1), decided November 16, 1938, reported in Gazette du Palais, November 26, 1938.

In that case, a prospectus was published in Holland, mentioning that the securities were to be serviced in Canadian gold currency, and offering to the subscribers the option to obtain payment of the interest either in Canada (in

[15] For a collection of cases, foreign and domestic, involving the Joint Resolution, see Plesch, *The Gold Clause, a Collection of International Cases and Opinions*, Vol. 2, 2nd Ed., Stevens & Sons, Ltd., London. (1936).

Canadian gold dollars), or in the Netherlands in Dutch guilders, at the prevailing rate of the day, and it was announced that listing of the issue would be requested on the Amsterdam Stock Exchange.[16] The bonds, as finally issued, did *not* contain the optional foreign currency clause, and provided only for payment in Canada in gold currency of the Dominion of Canada.[17] Nevertheless, the French Court, in a suit against a French defendant, held the Canadian Joint Resolution to be inapplicable in France (due in part to the international character of the loan), and ordered the defendant to pay to the plaintiff "the counter value in Dutch Guilders at the rate in force on the date when payment is to be made, * * *." (The decision is in the French language and the quotations are translations.)

To the same effect are the *"Conclusions of Attorney General Berger, Attached to the Supreme Court of the Netherlands, in the matters concerning the loan of the Societe des Services Contractuels des Messageries Maritimes,"* reported in Nieuwe Rotterdamsche Courant, March 3, 1939.

See also a decision of the Federal Supreme Court of Switzerland, Part I for Civil Affairs, February 1, 1938, in the matter of *Allgemeine Elektricitaets Gesellschaft* (*A.E.G.*) of Berlin and *Siemens & Halske Aktiengesellschaft* of Berlin v. *Journaliag, Aktiengesellschaft* (Corporation) of Glarus (published in Paris by the Librairie de Jurisprudence Ancienne et Moderne—Plesch, "Die Goldklausel"[18]). At pages 173 to 190, the Swiss Court, finding that part of the loan was intended for Switzerland, and that the Court was not concerned with the question of whether or not the particular bonds were floated in Switzerland ("inasmuch as all creditors must receive like treatment"), rejected a contention such as is advanced at bar, using the following language:

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[16] This circumstance is similar to the circumstance at bar, the offering circular at bar (R. 77) indicating that an application would be made to list on the New York Stock Exchange, and, if deemed desirable, on one or more foreign exchanges, and the Bonds actually having been listed on the New York, London and Amsterdam Stock Exchanges (R. 55-56).

[17] In this respect, the case at bar is stronger, because the Bonds actually contain the "optional clause" (R. 28).

[18] The publication is in German and the quotations are translations.

"However, it must not be demanded beyond this that each individual holder of a bond submits proof with regard to the acquisition of his bond prior to the enactment of the German law covering bonds in foreign currency, or possibly of the Joint Resolution. This will also not be admissible for the reason that it would be in conflict with the essence of a bond to subject to different treatments bonds of the same loan which cannot be distinguished externally, namely, depending on whether they have been received in Switzerland prior to or after a focal date (Hartenstein in the Juristische Wochenschrift 1936 II 2019, item 5). Aside from this it would also lead to practically insurmountable difficulties if in each individual case the origin of the bond and the time of acquisition of purchase would have to be proven. Therefore, all bonds of the same loan must enjoy like treatment, and the result of this is that at least in cases of the kind referred to above, in connection with which there exists a legally sufficient internal relationship, all bondholders may refer to the Swiss public policy."

The Court refused to apply the German Exchange restrictions, and further stated that "it need not be decided whether the American Joint Resolution was not inapplicable to the gold clause question in the case under consideration here also for the reason that it claims only a strictly territorial application." and ordered payment of the counter value abroad of United States gold dollars.

A similar decision was reached by the Court for Civil Matters of the Department of the Seine on July 23, 1936, in *Guebhard* v. *Siemens & Halske A. G. and Siemens-Schuckertwerke G.M.B.H.*, to be found at pages 45-51 of "Recueil D'Arrets Et De Consultations Sur La Clause-Or," Plesch, published by the Librairie de Jurisprudence Ancienne & Moderne, in Paris, 1937.

In our Main Brief (p. 79), we refer to a case involving the Canadian Joint Resolution. *British & French Trust Corporation, Ltd.* v. *New Brunswick Railway Co., Ltd.*, 54 The Times L. R. 172 (1937) (Court of Appeal) (affirmed by the House of Lords, December 13, 1938, 55 The Times L. R. 260).

The Court of Appeal decided that England was the place of performance in the particular gold clause bond involved (which was issued by a Canadian corporation and payable in British sterling, or optionally in Canadian dollars).

The Court of Appeal found (54 The Times L. R. at 173):

> "* * * that the law of England governed the transaction both with regard to the mode of payment and the measure of the amount of payment,"

thus applying the same doctrine of Conflict of Laws which, we submit, compels a decision in favor of Respondents at bar.

It is thus seen that the foreign decisions, as well as domestic law, sustain Respondents' contentions, and that no valid argument has been presented which impairs Respondents' right to recover in full as sued for by them.

III.

CONCLUSION.

The Government brief, based as it is upon a misunderstanding of the legal, constitutional, and economic problems involved, and being in express conflict with the Congressional and administrative construction of the Joint Resolution (in so far as concerns its application to the multiple currency features of the Bonds and coupons) creates no basis for disagreeing with the New York Court of Appeals below.

The judgment appealed from should be affirmed.

Dated, New York, May 2, 1939.

Respectfully submitted,

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